THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

In Re: Application of Blue Granite Water Company for Approval to Adjust Rate Schedules and Increase Rates ..... Appellant.

South Carolina Public Service Commission Docket No. 2019-290-WS

Appellate Case No. 2020-001283

PETITION FOR WRIT OF SUPERSEDEAS

Blue Granite Water Company (the "Company"), Appellant, respectfully petitions this Honorable Court for a writ of supersedeas as related to the South Carolina Public Service Commission's (the "Commission") stay of the Company's implementation of rates under bond. The Company has filed a Notice of Appeal and files this petition pursuant to S.C.A.C.R. 240 and 241. Directives from the Commission are not automatically stayed on appeal, and the Company requests that the Court suspend the Commission's stay until such time as the Court has issued a final decision on appeal as to the stay.

As the Commission has previously and consistently found, S.C. Code Ann. § 58-5-240(D) (the "Bond Provision") permits a utility to implement rates under bond once it has filed a petition for rehearing as a matter of right. Pursuant to that right, the Company procured a bond and received Commission approval of the bond amount and surety. In spite of the narrow authority granted to the Commission by the Bond Provision and the Commission's approval of the bond, the Commission unlawfully stayed the Company's implementation of rates under bond, which was set to begin on September 1, 2020. In this utility rates context, the Company is precluded from

retroactively correcting rates to recover the lost revenues and—while the Commission's stay is pending—absent relief, the Company must forego these revenues and suffer from degraded cash liquidity, despite being required to continue its utility operations and investments on an ongoing basis. For these reasons, the Company requests supersedeas from this Court to suspend the Commission's stay.

STATEMENT OF FACTS

On October 2, 2019, the Company filed an Application for Approval to Adjust Its Rate Schedules and Increase Rates ("Application"). The Commission conducted an evidentiary hearing on the Application from February 26, 2020 through March 2, 2020. Recognizing the potential impact of the COVID-19 pandemic on customers, on March 19, 2020, the Company filed a letter with the Commission offering to delay the implementation of new rates until September 1, 2020, even though the Commission was required under the applicable statute to issue an order on the Company's rate Application in April 2020. Less than a week later, on March 25, 2020, the Commission issued Order No. 2020-260, accepting the Company's commitment not to implement new rates until September 1, 2020. This order is attached hereto as Exhibit A.

On April 9, 2020, in Order No. 2020-306, the Commission ruled on the Company's Application, denying a significant portion of the rate relief sought by the Company. This order is attached hereto as Exhibit B. On April 29, 2020, Blue Granite filed a Petition for Rehearing or Reconsideration with the Commission. On May 28, 2020, the Commission issued a decision on reconsideration.

On June 8, 2020, pursuant to the Bond Provision, the Company filed a motion for approval of a bond that would secure for customers the difference between the revenue requirement authorized by the Commission and that which the Company intended to implement under bond, in addition to annual interest. Under the Commission's regulations, S.C. Code Ann. Reg. 103-

829(A), responses to motions are due within ten days of service, and none were filed by any party to the proceeding. On July 15, 2020, the Commission approved the Company's motion for approval of the bond by a 6-0 vote. This Directive is attached hereto as Exhibit C. On August 7, 2020, the South Carolina Department of Consumer Affairs (the "Consumer Advocate") filed a letter seeking clarification as to whether Blue Granite was permitted to implement rates under bond effective September 1, 2020 and expressing its concern as to the impact of the rates on consumers. The Company filed a response to the Consumer Advocate's letter on August 13, 2020, and filed its executed surety bond, procured from Liberty Mutual Insurance Company, on August 17, 2020. The executed surety bond is attached hereto as Exhibit D.

On August 18, 2020, the Commission issued Order No. 2020-549, directing the Clerk's office to schedule oral arguments on the issues raised by the Consumer Advocate and staying the implementation of rates under bond "until further notice." This order is attached hereto as Exhibit E, and a certified copy of the order is being filed herewith. This is the order that is the subject of the instant pleading. Given the emerging uncertainty surrounding the Company's ability to recover the revenues associated with its rates under bond, on August 23, 2020, the Company filed a petition for approval of an accounting order to permit it to defer, in a regulatory asset account, the difference between the rates approved by the Commission on reconsideration and the rates it had planned to implement under bond. The Commission held oral arguments on August 27, 2020, and issued a Directive on August 31, 2020 maintaining its stay of the Company's rates under bond and granting the Company's request for an accounting order. A certified copy of this Directive is attached hereto as Exhibit F. On September 1, 2020, the Company implemented the rates authorized by the Commission on reconsideration.

On September 4, 2020, the Company filed a petition for reconsideration of Commission Order No. 2020-549, the order staying the implementation of the Company's rates under bond.

Also on September 4, 2020, the Commission re-posted, from its official Twitter account, the Consumer Advocate's "victory tweet," lauding the Commission's decision to stay the Company's implementation of rates under bond "which would have added strain to consumers' wallets in the midst of the #COVID19 crisis," and linking to the Consumer Advocate's press release discussing the proceeding in more detail. A screenshot of the tweet is attached hereto as Exhibit G. The Consumer Advocate is an intervenor and has been an active participant in the proceeding before the Commission.[1]

On September 16, 2020, the Commission approved a motion—memorialized in a Directive—denying the Company's petition for reconsideration, finding that, by requesting the regulatory accounting order, the Company had "waiv[ed] any objection to the continuing Stay placed into effect by Order No. 2020-549." A certified copy of this Directive is attached hereto as Exhibit H. The motion did not address any of the Company's arguments articulated in its petition for reconsideration, namely that the Commission lacks authority to stay the implementation of rates under bond, that the Commission's decision-making in staying the rates under bond had been arbitrary and capricious, and that the stay constitutes a violation of the Company's substantive due process rights. On September 23, 2020, the Commission issued its final order on reconsideration of the rate proceeding, Order No. 2020-641, and the Company filed its Notice of Appeal with this Court on September 25, 2020. Order No. 2020-641 is attached hereto as Exhibit I.

PETITION FOR WRIT OF SUPERSEDEAS

A. Legal Framework

S.C. Code Ann. § 1-23-380(2) provides that "[e]xcept as otherwise provided in this chapter,

[1] S.C. Code Ann. § 37-6-604(C), added to the Code by Act No. 258 of 2018, permits the Consumer Advocate to intervene in proceedings before the Commission. On November 25, 2019, the Consumer Advocate filed a petition to intervene, which was granted by the Commission on December 10, 2019 by Order No. 2019-849.

the serving and filing of the notice of appeal does not itself stay enforcement of the agency decision." There is no other provision of Title 1, Chapter 23 that applies to the instant proceeding, and the automatic stay resulting from S.C.A.C.R. 241(a) that would apply to the Commission's decision ordering the stay of rates under bond does not apply in this case. *See also* S.C. Code Ann. Regs. 103-856(B) ("Except as otherwise provided by law, an appeal from an Order of the Commission shall not of itself stay or suspend operation of the Order of the Commission."). It appears, therefore, that the Commission's order enjoining the Company from implementing its rates under bond is not automatically stayed in this case.

S.C.A.C.R Rule 241(c)(2) provides that the Court should consider whether a writ of supersedeas "is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." S.C.R.C.P. 65, an analog rule for imposing injunctive relief, requires a party to demonstrate that it would suffer irreparable harm, it is likely to succeed on the merits of its claims, and that there is no adequate remedy at law. The Corpus Juris Secundum offers similar considerations for review, namely irreparable injury in the absence of a stay, the party's likelihood of prevailing on the merits, and that a stay will not substantially harm other interested parties nor harm the public interest. 4 C.J.S. Appeal and Error § 530. Excerpting a previous version of the C.J.S., the South Carolina Court of Appeals has noted that one of the purposes of a supersedeas is "to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." *Graham v. Graham*, 301 S.C. 128, 130 (Ct. App. 1990); *see also Porter v. Lesesne*, 67 S.E. 453, 85 S.C. 399 (S.C. 1910) ("An order staying proceedings pending appeal to the Supreme Court, as it seems to me, should be made only when it appears that the party making the application has just reason to apprehend that without a stay he would be deprived of the benefit of the favorable result of the appeal."). Each of these principles supports the imposition of supersedeas in this case.

B. Regulatory Background

Unlike in a typical litigation proceeding between two parties, at the conclusion of which the aggrieved party may be made whole, in this utility ratemaking context, the Company is precluded from being made whole by the long-standing prohibition on retroactive ratemaking. *See, e.g.*, *Hamm v. Pub. Serv. Comm'n of S.C.*, 310 S.C. 13, 20 (S.C. 1992) ("We affirm so much of the circuit court's order as finds that a deficiency-based levelized charge to customers for TOP costs is prohibited in that it constitutes retroactive ratemaking."). For that reason, while customers would be protected by the bond required by the Bond Provision and obtained by the Company, and the 12 percent interest covered by the bond as required by the Bond Provision, without implementation of its rates under bond, the Company does not have similar protection.

The Company has no other adequate remedy available to it. While the Commission has authorized the Company to establish a regulatory asset account in which it may track the lost revenues resulting from the Commission's stay, such tracking does not guarantee future recovery. In fact, emphasizing the Company's lack of guarantee of recovery, in approving the deferral request, the Commission's unanimous motion stated that issuance of the accounting order "will not prejudice the right of any party to address or challenge the recovery of these costs in a subsequent rate proceeding." Exhibit F (Aug. 31, 2020 Directive, Docket No. 2019-290-WS). As one recent example, through Order No. 2018-182, the Commission authorized the Company to defer in a regulatory asset account legal expenses associated with two proceedings before the Administrative Law Court. In the rate case order in the instant, below proceeding, however, the Commission denied the Company's request to recover these duly deferred expenses. The Company is not optimistic that the Commission will permit recovery of the deferred revenues at issue, and even if recovery is eventually permitted, it is unknown when and on what terms such recovery would occur. This is in stark contrast to the Bond Provision's authorization of the immediate implementation of rates under bond. Also in contrast to implementing rates under bond

pending an appeal, a deferral—as a regulatory accounting mechanism—provides no cash liquidity for the Company, which must continue its utility operations and investments in spite of the Commission's stay.

The purpose of putting rates into effect under bond is to establish the necessary balance between protecting the customer's right to fair and reasonable rates and protecting the utility's need to receive revenues that support its operations and investment. The U.S. District Court in South Carolina and the U.S. Supreme Court have weighed in on these issues. In *United Gas Pipeline Co. v, Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958) (*United Gas Pipeline*), the U.S. Supreme Court found the following as related to the utility's implementation of rates under bond under a similar federal statute:

> It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interest of natural gas companies in whose financial stability the gas-consuming public has a vital stake. Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult, if not impossible.

358 U.S. 103, 113. In *Holt v. Yonce, Chairman of the S.C. Public Service Commission*, 370 F.Supp. 374 (D. S.C. 1973), affirmed by the U.S. Supreme Court at 94 S.Ct. 1553 (1974), the Court was likewise faced with a challenge to the statutory allowance of permitting utilities to put rates into effect under bond, in that case involving South Carolina Electric & Gas. The Court relied upon *United Gas Pipeline*, finding that, while rate increases may be difficult for certain customers, such increases "make possible expanded utility service to all who need it." 370 F.Supp. 374, 379. The Court in that case rejected the plaintiffs' challenge.

Further, should the Company eventually be permitted to recover the deferred amounts in

future rates following a future (hypothetical) rate proceeding, it may be denied recovery of the associated time value of the deferred amounts, and, in the interim prior to such recovery, the Company's cash liquidity is materially compromised. For these reasons, the stay imposed by the Commission in this case has a clear, uniquely punitive impact on the Company.

C. Supersedeas Is a Necessary and Appropriate Remedy in This Case

The Company asks the Court to impose a supersedeas suspending the Commission's stay on the Company's implementation of rates under bond, until such time as the Court has issued its final order on appeal as to the Commission's stay. S.C.A.C.R Rule 241(c)(2) provides that the Court should consider whether a writ of supersedeas "is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." As previously explained by the Court, an issue becomes moot "when some event occurs making it impossible for the reviewing Court to grant effectual relief." *Curtis v. State*, 345 S.C. 557, 567 (2001). Due to the prohibition on retroactive ratemaking, for every day that passes under the Commission's stay, the Company's lost revenues become moot as contemplated in S.C.A.C.R. 241(c)(2) and the Court loses its ability to grant effectual relief as to those revenues. Indeed, the Court's correction of the Commission's unlawful stay will have "no practical legal effect" as to the revenues lost by the Company and as to the Company's degraded liquidity. *Id.* For these reasons, the ongoing, irreparable harm to the Company unlawfully created by the Commission warrants a prompt, intermediate remedy until the matter is resolved.

The Company is likely to succeed on the merits in this case. The Commission lacks the necessary authority to stay the implementation of the Company's rates under bond, and such a stay is therefore an *ultra vires* act. The Court has previously concluded the following concerning the limits on administrative agencies' authority:

It is elementary law that administrative agencies are creatures of statute and their

> power is dependent upon statute, so that they must find within the statute warrant for the exercise of any authority which they claim. . . . Such (administrative) bodies, being unknown to the common law, and deriving their authority wholly from constitutional and statutory provisions, will be held to possess only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to the powers expressly granted. . . . Any reasonable doubt of the existence in the commission of any particular power should ordinarily be resolved against its exercise of the power.

Calhoun Life Ins. Co. v. Gambrell, 245 S.C. 406, 408 (1965) (internal citations omitted). As creatures of statutes, regulatory bodies "have only the authority granted them by the legislature." *Responsible Economic Development v. South Carolina Dep't of Envir. Control*, 371 S.C. 547, 553 (2007). For that reason, any action taken by the agency "outside of its statutory and regulatory authority is null and void." *Id.*; *Triska v. Dep't of Health & Envtl. Control*, 292 S.C. 190, 194 (1987) (citing 73A C.J.S. Public Administrative Law and Procedure, § 117 (1983)); *see also* 73 C.J.S. Public Administrative Law and Procedure § 163 (2020) ("[Administrative agencies] must follow statutory established standards and not their ideas of what would be charitable or equitable, and may not ignore or transgress the statutory limitations on their power, even to accomplish what they may deem to be laudable ends, such as service of the public interest. Agency actions beyond delegated authority are ultra vires and should be invalidated. Stated another way, an agency that exceeds the scope of its statutory authority acts ultra vires and the act is void.").

The narrow ambit of the Commission's authority granted by the Bond Provision is to consider and approve the reasonableness of the amount of the bond and the adequacy of the surety. *See* S.C. Code Ann. § 58-5-240(D) ("If the Commission rules and issues its order within the time aforesaid, and the utility shall appeal from the order, by filing with the Commission a petition for rehearing, the utility may put the rates requested in its schedule into effect under bond only during the appeal and until final disposition of the case. Such bond must be in a reasonable amount approved by the Commission, with sureties approved by the Commission . . . ."). The Commission

granted such approval by unanimous vote on July 15, 2020, finding that "[t]he Commission has no discretion other than to approve the amount of bond and the sureties." Exhibit C (July 15, 2020 Directive, Docket No. 2019-290-WS). Further, the Commission has repeatedly held that it is "without discretion to prohibit the utility from imposing its proposed rates under an appropriate bond," and that the statute grants utilities the authority to "impose its proposed rates under bond as a matter of right . . . ." Order No. 2008-269 at 3-4, Docket No. 2007-286-WS (Apr. 25, 2008); Order No. 2010-543 at 3-4, Docket No. 2009-479-WS (Aug. 12, 2010); Order No. 2016-156 at 4, Docket No. 2014-346-WS (Mar. 1, 2016). These orders are attached hereto as Exhibit J. Although there is no ambiguity whatsoever in the Bond Statute, "[a] consistent mode of applying a statute by the responsible governing agency has been given considerable judicial deference in the construction of ambiguous statutes." *Bunch v. Cobb*, 273 S.C. 445, 452 (1979) (citing *Weeks v. Friday*, 255 S.C. 447, 452 (1971); *see also Stuckey v. State Budget and Control Bd.*, 339 S.C. 397, 401 (2000) ("In construing an ambiguous statute, we give great deference to the government agency's consistent application of the statute."). Indeed, the lack of ambiguity in the Bond Statute supports the Commission's previous, repeated conclusions that it has no discretion as related to a utility's implementation of rates under bond.

It is clear from the Bond Provision, and from the Commission's interpretation of the Bond Provision for more than a decade, including in the Directive issued in this case, that the Commission—as a creature of statute with finite powers—lacks the authority to stay the implementation of rates under bond. It is telling, and troubling, that the Commission re-posted the Consumer Advocate's "victory tweet" in this case while the proceeding was still pending before the Commission. This Court recently chastened the Commission to "carry out [its] important responsibilities consistently, within the 'objective and measurable framework' the law provides." *Daufuskie Island Util. Co. v. S.C. Office of Regulatory Staff*, 427 S.C. 458, 464 (2019) (citing *Utils.*

Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 113 (2011)). The Commission's unique punishment of Blue Granite in this case fails to comply with this Court's directive.

While the Bond Provision provides that "there may be substituted **for the bond** other arrangements satisfactory to the Commission for the protection of parties interested," such does not confer upon the Commission the authority to stay a utility's right to implement rates under bond. S.C. Code Ann. § 58-5-240(D) (emphasis added). The substitution authorized by the statute, by its plain language, is "for the bond," not for the utility's statutorily authorized option to implement rates that are secured by a bond or by some other substitute arrangement. *See Nucor Steel v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 543 (1992) ("In interpreting a statute, it is imperative that the statute be accorded its clear meaning."). Previous arrangements alternative to a bond have included letters of credit and letters of undertaking while the utility implemented new rates. *See* Order No. 1982-491, Docket No. 1982-247-W (July 14, 1982); Order No. 1981-176, Docket No. 1981-84-S (Mar. 18, 1981); Order No. 1982-218, Docket No. 1982-111-W (Mar. 31, 1982); Order No. 1980-352, Docket No. 1980-162-WS (June 13, 1980). These orders are attached hereto as Exhibit K. Such types of guarantees[2]—bonds, letters of credit, and letters of undertaking—protect customers by providing a reserve of funds should rates later be reduced and protect the utility by permitting new rates to go into effect. Regulatory accounting treatment—in contrast to implementing rates protected by a guarantee—provides no certainty of recovery and is therefore not a "substitute" as contemplated and required by the Bond Provision. Further, even assuming *arguendo* that the Bond Provision permitted alternative arrangements to implementing rates on appeal as protected by a guarantee—which it does not—contrary to the requirements of

[2] "Guarantee" is defined as "[s]omething given or existing as security, such as to fulfill a future engagement or a condition subsequent." Guarantee, Black's Law Dictionary (11th ed. 2019).

the Bond Provision, regulatory accounting treatment does not offer sufficient "protection of parties interested." "Administrative discretion can be exercised *only . . . in accordance with the standards prescribed by statute or ordinance*." *Atlantic Coast Line R. Co. v. S.C. Pub. Serv. Comm'n*, 245 S.C. 229, 235 (1965) (emphasis added) (citing *Hodge v. Pollock*, 223 S.C. 342 (1953)). While the Commission has the authority to approve the implementation of a substitute for the bond under the Bond Provision, such does not go so far as to empower the Commission to stay the implementation of rates under bond.

Never before has the Commission found that it has the authority to stay a utility's implementation of rates under bond and, in fact, the Commission recently found that it "has not been authorized by statute to grant injunctive relief." Order No. 2019-521, Docket No. 2019-204-E (July 17, 2019). This order is attached as Exhibit L. The Administrative Procedures Act provides that, even for state agencies that actually are authorized to seek injunctive relief, such must be done through the Administrative Law Court rather than under their own auspices. S.C. Code Ann. § 1-23-600(F). Nevertheless, the Commission now finds that it can wield such injunctive power as against the Company, and it does so with punitive effect.

Customers would be adequately protected should the Court issue a writ of supersedeas overturning the Commission's stay. As contemplated in S.C.A.C.R. 241(c)(3), "[t]he granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate." Pursuant to the Commission's practice and the Bond Provision, the Company has already procured and filed with the Commission a bond that secures for customers the amount of the rate increase and 12 percent annual interest. This bond remains in effect and will remain in effect until it is released by the Commission. *See* Exhibit D. Should the Court grant the relief

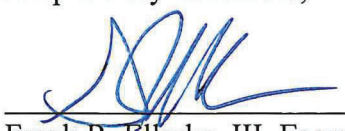
requested in this petition, to avoid customer confusion, the Company would provide customers with 30 days' notice prior to implementing rates under bond.

The Company acknowledges that S.C.A.C.R. 241(d) requires that an application for supersedeas be filed with the administrative tribunal first "[e]xcept where extraordinary circumstances make it impracticable," including where there is an "unnecessary delay" in the administrative tribunal's ruling on the petitioner's request for supersedeas. In this case, the Commission's stay was implemented through Order No. 2020-549, issued on August 18, 2020. *See* Exhibit E. The stay was then reaffirmed after filings made by the Company and the Consumer Advocate, and after oral arguments held on August 27, 2020 and in a Directive on August 31, 2020. *See* Exhibit F. On September 4, 2020, the Company formally sought reconsideration of the stay, which was denied in a Directive issued on September 16, 2020. *See* Exhibit H. While the Company's filings with the Commission did not frame its requested relief as one of "supersedeas," the Company did argue against and seek reconsideration of the Commission's stay (for which the Commission has no legal authority), which was denied. Further, the Company submits that extraordinary circumstances exist in this case in which the agency's unlawful action causes the Company to daily forego revenues and cash liquidity.

CONCLUSION

The Company believes that the requested supersedeas is warranted and necessary in this case to correct the unlawful decision-making by the Commission that has daily and ongoing punitive effects on the Company. The Company appreciates the Court's consideration of this petition and its attention to the Commission's execution of its important responsibilities "within the objective and measurable framework the law provides." *Daufuskie Island Util. Co. v. S.C. Office of Regulatory Staff*, 427 S.C. 458, 464 (2019).

Respectfully submitted,



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September 28, 2020

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VERIFICATION

I, Donald Denton, President of Blue Granite Water Company, verify that, to the best of my knowledge and belief, the facts set forth in the foregoing Petition for Writ of Supersedeas are accurate and true.

Executed on September 28, 2020.

Donald Denton
~~Blue~~ Granite Water Company, President

Sworn to and subscribed before me this 28 day of September, 2020.

Signature of Notary: _____

Notary's printed name: JAMES HINCKLEY

Notary Public for: CRAVEN COUNTY, NORTH CAROLINA

My commission expires: 03/21/2024

JAMES HINCKLEY NOTARY PUBLIC CRAVEN COUNTY, NORTH CAROLINA